

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
May 6, 2008 Session

JANET E. BILLINGSLEY-TRAVIS v. JAMES KENNETH TRAVIS

Appeal from the Chancery Court for Rutherford County
No. 97DR-339 J. Mark Rogers, Judge

No. M2006-02305-COA-R3-CV - Filed May 28, 2008

This appeal concerns an action to increase child support. The trial court ordered Father to pay child support in the amount of \$900 per month, which is an upward deviation from the Child Support Guidelines, and \$2,000 per year, at a minimum, for private school tuition. Father contends on appeal that the trial court erred in ordering an upward deviation of his child support obligation and that he should not be ordered to make yearly tuition payments. We find the trial court's upward deviation from the Child Support Guidelines to be supported by the record but find the additional requirement of \$2,000 per year for tuition to be excessive. Therefore, we reverse in part and affirm in part the decision of the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed in Part
and Reversed in Part**

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, P.J., M.S., and ANDY D. BENNETT, J., joined.

Bert W. McCarter, Murfreesboro, Tennessee, for the appellant, James Kenneth Travis.

Stephen W. Pate, Murfreesboro, Tennessee, for the appellee, Janet E. Billingsley-Travis.

MEMORANDUM OPINION¹

The marriage of Janet E. Billingsley-Travis ("Mother") and James Kenneth Travis ("Father") produced two sons. Their sons were 8 and 6 years old, respectively, when the parents divorced in June of 1997. The Marital Dissolution Agreement incorporated into the Final Decree of Divorce set

¹Tenn. Ct. App. R. 10 states:

This Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated "MEMORANDUM OPINION," shall not be published, and shall not be cited or relied on for any reason in any unrelated case.

Father's child support obligation at \$135 per week. Neither child was in private school at the time of the divorce, and the Agreement made no mention of private education for the parties' two minor children.

Subsequent to the entry of the Final Decree of Divorce, the parties entered into an informal understanding whereby Father voluntarily agreed to increase his child support payments from \$135 per week to \$165 per week. The parties later informally agreed to increase Father's obligation to \$200 per week, and eventually they agreed to increase it to \$900 per month. No order was issued by the court regarding these voluntary increases in Father's child support obligation. However, Father timely made all payments.

Mother subsequently advised Father that she wanted the boys to attend The Webb School, a scholarly private school in Bell Buckle, Tennessee. Father acknowledged that it would be good for their sons to attend the school. However, he informed Mother that he could not afford the tuition and could not make any significant contributions to their tuition, but he would endeavor to make periodic contributions toward their tuition based upon his ability to contribute from time to time. Following these discussions, Mother submitted an application for admission for their older son to be enrolled in the seventh grade. The application was approved and the older son enrolled in the seventh grade in the fall of 2000. The younger son enrolled in the seventh grade the following year. Both sons were attending The Webb School when this petition was filed.²

Eight years after the parties divorced and while both boys were attending The Webb School, Mother filed a Petition for Entry of Parenting Plan, For Increased Child Support and Other Relief. In his Answer and Counter-Petition, Father asserted that he had been voluntarily paying \$900 per month in child support, which was in excess of the guidelines, and as much as \$2,000 per year toward tuition.

Following a hearing, the trial court granted Mother's petition and ordered Father to pay child support for the two sons in the amount of \$900 per month,³ which was an upward deviation of \$282 from the presumptive amount, pursuant to the Child Support Guidelines of \$618 per month, plus an additional \$2,000 annually for tuition. In the order entered on September 22, 2006, the trial court made the following findings:

The court affirmatively approves this upward deviation as being in the best interest of the minor children, based upon the findings that the parties voluntarily increased the child support to the amount as presently ordered, the needs of the children having increased, to insure the children can continue their education, to assure that Mother

²The older son graduated in May of 2007 and the younger son graduated in May of 2008.

³Father was additionally ordered to pay for cellular telephones and service for both children. Father had agreed to provide the phones and service prior to the trial court's award of the upward deviation and additional \$2,000 per year tuition assessment. On appeal, he states that he is willing to pay the additional expense for the cellular phones but challenges all other upward deviations.

can continue with her maintenance of the home and support of the children, based upon Mother's prior reliance upon the sum of \$900.00 per month as voluntarily paid by Father, that Mother carries the brunt of borrowing \$40,000.00 for private school tuition, which she still owes and is still outstanding, and that she is currently under a loan for an additional \$11,000 for the upcoming school tuition.

....

In addition to child support, Father shall pay the minimum sum of \$2,000 per year, towards the minor children's private school tuition with Webb School, which is consistent with Father's pleadings, wherein he claims to have paid said sum during the previous years as reimbursement for the children's private school tuition.

Father filed a timely notice of appeal to challenge the above order. While the appeal was pending, Father filed a Motion to Reduce Child Support and Tuition in the trial court. The reason for the motion was the parties's older son had reached the age of majority in February of 2007 and "will graduate from The Webb School on June 1, 2007." On June 20, 2007, the trial court granted Father's motion and reduced Father's child support obligation to \$564 per month due to the fact one child had reached the age of majority.⁴ The trial court, however, did not modify the requirement that Father pay \$2,000 annually to help defray the cost of tuition at The Webb School. Being dissatisfied with the ruling, Father filed a timely notice of appeal to challenge the second order. Thereafter, this court consolidated the two appeals.

ANALYSIS

Father contends the trial court erred in granting Mother an upward deviation of Father's monthly child support obligation and requiring that he remit an additional \$2,000 for tuition.

The amount of support derived from a proper application of the formula in the Child Support Guidelines becomes the presumptive amount of child support owed. *Richardson v. Spanos*, 189 S.W.3d 720, 725 (Tenn. Ct. App. 2005). This amount of support, however, is rebuttable, Tenn. Code Ann. § 36-5-101(e)(1)(A); Tenn. Comp. R. & Regs. 1240-2-4-.01(1)(d)(1) (2008); *Taylor v. Fezell*, 158 S.W.3d 352, 357 (Tenn. 2005), and a trial court may, in its discretion, deviate from the amount of support required by the Child Support Guidelines. *State v. Wilson*, 132 S.W.3d 340, 343 (Tenn. 2004); *Jones v. Jones*, 930 S.W.2d at 545. When a trial court deviates from the guidelines, the court is required to specifically state in written findings why the application of the Child Support Guidelines would be unjust or inappropriate in the case. Tenn. Code Ann. § 36-5-101(e)(1)(A); Tenn. Comp. R. & Regs. 1240-2-4-.07(1)(b) (2008).

In the present case, the trial court acknowledged that it was imposing an upward deviation by setting Father's child support obligation at \$900 per month in the first order (for two children) and \$564 in the second order (for one child). The trial court articulated specific findings as to why

⁴The child support award of \$564 per month for one child included an upward deviation of \$141 per month.

the upward deviation was warranted. Specifically, the trial court listed the best interests of the children, the need to insure the children can continue their education at The Webb School, Mother's previous reliance on Father's voluntary child support payments, and the amount of debt Mother had incurred to pay the children's tuition.

Because child support decisions retain an element of discretion, we review these decisions based upon the deferential "abuse of discretion" standard. *Richardson*, 189 S.W.3d at 725. This standard is a review-constraining standard of review that calls for less intense appellate review and, therefore, less likelihood that the trial court's decision will be reversed. *Id.* (citing *State ex rel. Jones v. Looper*, 86 S.W.3d 189, 193 (Tenn. Ct. App. 2000); *White v. Vanderbilt Univ.*, 21 S.W.3d 215, 222-23 (Tenn. Ct. App. 1999)). Discretionary decisions must, however, take the applicable law and the relevant facts into account. *Ballard v. Herzke*, 924 S.W.2d 652, 661 (Tenn. 1996).

After a careful review of the record, including the specific reasons articulated by the trial court in its order as justification for the upward deviation, we find no error with the trial court's decision to set child support at \$900 per month for the support of the parties' two children. The upward deviation was justified due to the extraordinary educational expenses incurred to send both boys to The Webb School. We also agree with the trial court's finding that it was in the children's best interest to continue to attend that school. For the same reasons articulated above, we also find no error with the trial court's decision to modify child support, by setting it at \$564 per month, which is also an upward deviation.

Although we affirm the amount of the monthly award for child support set forth in the two orders at issue on appeal, each of which constituted a significant upward deviation, we are unable to affirm the additional upward deviation in the amount of \$2,000 per year.

Educational expenses may justify an upward deviation from the Child Support Guidelines. *Richardson*, 189 S.W.3d at 728. Moreover, as *Richardson* instructs, if additional support for extraordinary educational expenses is justified, it should be calculated separately and added to the basic support award. *Id.* The trial court did just that in awarding the upward deviation in the amount of monthly child support to be paid by Father. The trial court, however, added an additional, substantial obligation of \$2,000 annually over and above the monthly award of support. The justification for this additional upward deviation was the same educational expense used for the upward deviation of Father's monthly child support obligation. Although the findings of fact stated by the trial court fully support the upward deviation of the monthly child support payments, we find the \$2,000 per year obligation, on top of the upward deviation, to be excessive. Admittedly, it was in the children's best interest to continue their education at The Webb School, due to the fact they had gone to the school since the seventh grade. Nevertheless, the children's best interest must be tempered by Father's ability to pay.

The trial court found it was in the best interest of the children to attend The Webb School; however, the court also acknowledged that "[t]hese parties do not appear to have the financial capacity to pursue private school education." We fully agree with the finding the parties do not have

the financial capacity to send their boys to private school without making extraordinary financial sacrifices.⁵

We have concluded that Mother needs and Father has the ability to pay monthly child support in the respective amounts set forth in the two orders on appeal; however, the additional sum of \$2,000 constitutes an amount that exceeds Father's ability to pay. We, therefore, reverse the additional upward deviation of \$2,000 per year.

IN CONCLUSION

The judgment of the trial court is affirmed in part and reversed in part, and this matter is remanded for further proceedings consistent with this opinion. Costs of appeal are assessed against the parties equally.

FRANK G. CLEMENT, JR., JUDGE

⁵The record shows that Mother had a gross income of approximately \$30,000 annually and that Father's gross income fluctuated during the relevant period. His gross income the year prior to the filing of the petition was only \$24,000. In 2005 his income was approximately \$42,000 and Father estimated that his gross income for 2006 would be approximately the same. The record also shows that in spite of Father's voluntary increases of child support and contributions toward tuition, and the fact the tuition had been reduced by The Webb School due to the parent's financial status, Mother was indebted in excess of \$40,000 from loans she had taken out to pay tuition and other school expenses.